(23,347)

In the Supreme Court

Of the United States

OCTOBER TERM, 1921

No. 392.

THE TERRITORY OF ALASKA and JUNEAU HARDWARE CO., a corporation,

Appellants,

—vs—

JOHN TROY, Collector of Customs for the District of Alaska,

Appellee.

Appellants' Brief

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CARDINAL QUESTION TO BE DECIDED

Is the equal right of ingress to and egress from the several states of the Union one of the rights guaranteed to citizens of the United States as such by the constitution, irrespective of whether such citizens are residents of a state or of a territory to which the constitution has been extended?

I.

STATEMENT OF THE CASE

This is a suit in equity instituted by appellants as plaintiffs below, to enjoin appellee, the defendant below, and his successors in office as collector of customs for the district of Alaska, from enforcing the provisions of sec-

tion 27 of the Merchant Marine Act, of June 5th, 1920, generally known as the Jones Law, and entitled,

"An act to provide for the promotion and maintenance of the American merchant marine; to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes."

Said section 27 reads as follows:

"That no merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this Act: *Provided*, That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities: *Provided further*, That this section shall not become effective upon the Yukon river until the Alaska Railroad shall be completed and the Shipping Board shall find that proper facilities will be furnished for transportation by persons citizens of the United States for properly handling the traffic."

Appellants contend that this section is in conflict with various provisions of the constitution of the United

States by reason of the fact that it discriminates in favor of the states and against the territories of the United States.

The Pleadings.

It is alleged in the complaint that the appellant, the Juneau Hardware Company, a corporation, is a merchant engaged in business as such at Juneau, Alaska, and intends to continue such business in the future; that all, or nearly all of the merchandise handled by such appellant in such business is and will be purchased by it in various parts of the United States outside the Territory of Alaska, and all or nearly all such merchandise has been, is and will be transported into the Territory from various parts of the United States outside of Alaska; that a shipment of merchandise has been forwarded to the appellant at Juneau from Evart in the State of Michigan; that this shipment has been routed over the Pere Marquette Railway from Evart, Michigan, to Chichago, Ill., thence over the Sault Ste Marie Railway and the Canadian Pacific Railway through Canada to the port of Vancouver in British Columbia, and thence "not via an American vessel, but via a British vessel and a vessel not authorized to carry freight and passengers between American ports, belonging to the Canadian Pacific Railway, a British corporation, to the port of Juneau in the Territory of Alaska"; that this shipment is now in transit over said route and will be so transported as aforesaid from the American point aforesaid through Canada and over a Canadian Railway to the port of Vancouver, British Columbia, thence on a British vessel not authorized to carry freight and passengers between American ports to the port of Juneau in the Territory of Alaska, in violation of the provisions of section 27 of the Act aforementioned. But it is alleged that this merchandise is otherwise shipped, transported, carried and manifested pursuant to the laws, rules and regula-

tions of the United States in such cases made and provided. (Record pg. 2).

It is further alleged that the Juneau Hardware Company will in the future continue in the same manner to ship to the Territory of Alaska large quantities of merchandise amounting in value to many thousands of dollars from points in the United States outside of Alaska, and to ship the same over Canadian Railway lines to the ports of Prince Rupert or Vancouver, thence via some foreign vessel not authorized to carry freight between American ports, all in violation of said regulation of commerce contained in said section 27, but otherwise in conformity with laws, rules and regulations of the United States in such cases made and provided.

It is then alleged that the defendant is the United States collector of customs for the district of Alaska, and that he has been instructed by the Secretary of Commerce of the United States to carry out the provisions of section 27 and to that end to confiscate all merchandise shipped or transported into the Territory of Alaska in violation of the provisions of said section, and that he now threatens, and that it is his intent and purpose, to confiscate the said shipment of merchandise above described and belonging to Juneau Hardware Company, and to confiscate all other shipments so made by the same appellant in violation of said provisions of said section 27, as soon as such merchandise arrives at the port of Juneau, Alaska on such British vessel, and to do so upon the ground and on the pretext that such is his duty as the United States customs collector of the district of Alaska.

It is further alleged that the defendant considers it his duty to confiscate all merchandise transported by land and water from a point in the United States through British territory to some point in the Territory of Alaska unless the same is carried over the water part of the route in a vessel built and documented under the laws of the

United States and authorized to engage in the coastwise trade in conformity with sections 18 and 22 of the Act of June 5th, 1920. (Record pg. 3.)

The constitutional claims of the appellants are then set up and asserted in the complaint (pg. 3) and it is further alleged that a large number of other citizens of Alaska desire and intend in the immediate future to import into the Territory of Alaska large quantities of merchandise amounting in value to many hundreds of thousands of dollars from various parts of the United States outside of Alaska, and to transport such merchandise over Canadian Railway lines to the ports of Vancouver or Prince Rupert in British Columbia and thence to the Territory of Alaska by some British vessel not authorized to engage in the coastwise trade, and that it is the purpose and intent of the defendant and his successor in office to unlawfully confiscate all such merchandise and to do so upon the ground and upon the pretext that it is their duty so to do as United States collector of customs. (pg. 4).

An injunction is prayed for perpetually enjoining and restraining defendant and his deputies, his successors in office and their deputies from confiscating the merchandise of any kind shipped to the Territory of Alaska by any person or corporation in violation of the provisions of section 27. (pg. 5).

The Territory of Alaska was joined as a party plaintiff and this proceeding was instituted in conformity with the rules prescribed by chapter 25 of the laws of Alaska of the year 1921 (Appendix A), and in compliance with Senate concurrent resolution No. 5 (Appendix B).

The Ruling of The Court.

Appellee filed two special and a general demurrer to the complaint. The special demurrers were abandoned, and the general demurrer was sustained and the case dismissed. The appeal is taken from the judgment of dis-

missal. (Pg. 6).

The court below held, in the first place, that the provisions of section 27 were not in conflict with the constitution and that congress had a legal right to discriminate against Alaska or any other territory, and, in the second place, that the complaint should have alleged that the Interstate Commerce Commission had established through routes to Alaska over the Canadian lines in question. (Pg. 7).

The Statutes as They Were.

Before the enactment of the Jones law, transportation between the states and Alaska over Canadian lines was extensive, the latter lines affording the shorter, cheaper and quicker routes.

This transportation has been conducted under section 3006, R. S. which provides:

> "Imported merchandise in bond, or duty paid, and products or manufactures of the United States, may, with the consent of the proper authorities of the British provinces or republic of Mexico, be transported from one port in the United States to another port therein, over the territory of such provinces or republic, by such routes, and under such rules, regulations, and conditions as the Secretary of the Treasury may prescribe; and the merchandise so transported shall, upon arrival in the United States from such provinces or republic, be treated in regard to the liability to or exemption from duty, or tax, as if the transportation had taken place entirely within the limits of the United States."

The rules of the Treasury Department under this section are set out in Articles 702 and 703 of the Customs Regulations issued by the Secretary of the Treasury.

The transportation of merchandise in foreign vessels between American ports is prohibited by Section 4347 R.

S. as superseded by Section 1, Act of February 17th, 1898 (Section 8097 Compiled Statutes) in the following language:

> "No merchandise shall be transported by water under penalty of forfeiture thereof from one port of the United States to another port of the United States, either directly or via a foreign port, or for any part of the voyage, in any other vessel than a vessel of the United States. But this action shall not be construed to prohibit the sailing of any foreign vessel from one to another port of the United States: Provided, That no merchandise other than that imported in such vessel from some foreign port which shall not have been unladen shall be carried from one port or place in the United States to another."

But this has been construed not to apply to American merchandise first shipped to a foreign port and then shipped to an American port in foreign bottoms.

U. S. vs. Two Hundred and Fifty Kegs of Nails, 61 Fed. 410.

The legislative intent on the subject of evasion of the foregoing section is expressed by Section 3110 R. S. (Section 5822 Compiled Statutes) in the following language:

> "If any merchandise shall, at any port in the United States on the northern, northeastern, or northwestern frontiers thereof, be laden upon any vessel belonging wholly or in part to a subject of a foreign country, and shall be taken thence to a foreign port to be reladen and reshipped to any other port in the United States on such frontiers, either by the same or any other vessel, foreign or American, with intent to evade the provisions relating to the transportation of merchandise from one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power, the merchandise shall, on its arrival at such last-

named port, be seized and forfeited to the United States, and the vessel shall pay a tonnage-duty of fifty cents per ton on her admeasurement."

Pursuant to these legislative and judicial expressions the Executive Department has recognized the right of shippers to transport merchandise over Canadian Railroads via foreign ships between American ports, and millions of tons have thus been anually transported during a period covering many decades.

The New Enactment.

Now comes the Jones law and declares that people in the territories shall no longer be permitted to avail themselves of foreign ships on these trans-Canadian routes, but that the people in the states may continue to do so.

A concrete illustration of the application of the law will make this feature here complained of clear:

Merchandise shipped from a point in eastern United States over a Canadian Railway to Vancouver may be carried in a British vessel from Vancouver to Seattle, but that same vessel may not carry the merchandise to any port in Alaska or Hawaii. And, vice versa: merchandise may be shipped from Seattle in a British vessel to Vancouver and thence over Canadian Railway line to Chicago, but the people of Alaska are prohibited from engaging in such trade under pains of having the shipment confiscated. They are required to use only American vessels. As there are no American lines operating between Alaskan and Canadian ports it has become necessary for Alaskans to do all their shipping over the port of Seattle,—which, of course, was the vicious purpose of the discrimination complained of.

Appellants Contentions.

The appellants contend that the law in question is dis-

criminatory and as such void because:

1. Its benefits apply only to the continental United States and only to that part of the continental United States which lies between Canada and Mexico.
2. It denies to United States citizens in the various territories the same commercial rights accorded to United States citizens in the "states."
3. The burden of building up the American merchant marine is placed primarily upon the shoulders of the territories and not equally upon the shoulders of the people in the rest of the country.

II.

SYNOPSIS OF ARGUMENT

1. The treaty ceding Alaska to the United States guarantees to the inhabitants of that Territory, "the enjoyment of all the rights, advantages and immunities of citizens of the United States," and that they "shall be maintained and protected in the free enjoyment of their liberty, property and religion."

   Equal rights to trade and commerce and the equal right of access to the ports and markets of the various states are held by this court to be property rights of citizens of the United States as such, and are guaranteed to the people of Alaska by the treaty with Russia.

   Section 2 of Article IV. of the constitution provides that,

   > "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

   The treaty with Russia makes this section ap-

plicable to Alaska.

2. Independent of the treaty congress has expressly extended the constitution to Alaska, first by section 1891 R. S., and later by section 3 of the Act of August 24, 1912, entitled,—

> "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes,"

and this court has declared in several decisions that Alaska has been incorporated into the United States and forms an integral part thereof.

For this reason Clause 6, Section 9, Article I. of the Constitution applies to and protects the ports of Alaska to the same extent it protects the ports of a state. This clause provides,

> "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another."

Under this clause of the Constitution the people of an "incorporated" territory have the same rights of ingress to and egress from the various parts of the United States as have citizens of a state.

It is conceded that the foregoing prohibition against discrimination by "regulation of revenue" aplies to and protects an incorporated territory. This protection would be futile unless it was accompanied by an inhibition against discrimination by "regulation of commerce," and for that reason the two are joined in the same clause.

The history of the enactment of this clause of the Constitution demonstrates it was intended to apply to the entire "American Empire."

In the Insular Cases this court held that the

clause in question would have operated to protect Porto Rico had that territory been incorporated into the United States, the same as is Alaska, or had Congress expressly extended the Constitution to that island.

3. The word "state" as employed in the Constitution is frequently interpreted by this court to include a territory. For instance, in the third clause of Section 8 (the Interstate Commerce clause) where authority is given "to regulate commerce with foreign nations and among the several states and with Indian tribes," this court has held it applies to commerce between a state and a territory.

Similar results have been obtained from construction of fifth Clause, Section 9, Article I; first Clause, Section 10; second Clause, Section 10; first Clause, Section 2, Article IV., and the fourteenth amendment to the constitution.

4. In dealing with an incorporated territory congress may act in two separate capacities. It may act as a federal legislature, and it may act as a local legislature for the internal affairs of the territory.

Acting as a federal legislature it is bound by the general limitations of the constitution.

Acting as a local territorial legislature it has such powers as are possessed by a state legislature, but no more.

The law here in question was enacted by congress in its federal capacity and under the Interstate Commerce clause of the constitution. Laws enacted under that power must be uniform and deal equally with all.

Whether acting as a federal or a territorial legislature congress has no power to deny the people of any territory to which the constitution has been

extended, the same rights of commerce accorded to the people of other parts of the country.

Clause 2 of Section 3, Article IV. which provides,

> "Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state,"

was not intended to in any manner deny to the people of "The Territory" the rights of American citizens, but was intended to give congress power to deal with internal affairs of the embryo states until they were able to assume the duties of their own sovereignty.

This section of the constitution must be read in conjunction with the ordinance of 1787 which remained in full force and effect after the constitution was adopted, and has been construed as applicable to all the territories incorporated into the Union after the adoption of the constitution.

5. It is not necessary to allege in the complaint that the rate tariffs had been filed with the Interstate Commerce Com. or that the latter has established through rates from Evart, Michigan to Juneau, Alaska, over the Canadian lines and via British vessels, for the reason that no valid law requires such proceeding. The Jones law requires that to be done only between ports of continental United States located between Canada and Mexico. The requirement of action by the Interstate Commerce Commission or the filing of tariffs does not extend by that section either to Alaska or Hawaii.

The entire section 27 is void because it discrimi-

nates in favor of that part of the United States which is on the continent and situated between Canada and Mexico. The Executive Departments cannot render it valid by extending the law to the territories which it expressly excludes.

Nor can the courts render the law constitutional by giving it an interpretation which congress expressly provides that it should not have.

No part of section 27 being valid, the law on the subject of transportation between the ports of Alaska and the other parts of the country remains the same as it was prior to the adoption of the void enactment.

III.

ARGUMENT

A.

THE TREATY WITH RUSSIA

The treaty with Russia provides in Article III. thereof, as follows:

"The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years, but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, *shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion.* The uncivilized tribes will be subject to such laws and regulations as the United States, may from time to time, adopt in regard to aboriginal tribes of that country."

What are the rights, advantages and immunities of citizens of the United States, which this treaty guarantees? What are the rights of free enjoyment of libery and property which are to be protected? Briefly, equality before the law; equal opportunities, equal advantages, equal protection.

> "Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views of his interests and the dictates of his conscience unrestrained, except by *equal*, just and *impartial* laws."
>
> Sharswood's Blackstone, 127, Note 8.

If the language of the treaty means anything, it means that the people of Alaska shall be entitled to the same rights, the same advantages, and the same immunities as the people in the several states, including *equal* rights to trade and commerce.

The new Merchant Marine Act in substance beclares that Alaska and Hawaii shall not have the same access to trade and commerce with the states which is enjoyed by the citizens in other places. They are denied equal privileges and advantages of commerce with, and equal ingress to and egress from, the various states, that are enjoyed by and guaranteed t the citizens of the United States in the other parts of the Country.

The lower court was logical in arguing that if Congress had power to close the ports of Alaska, though the ports of the rest of the Country be kept open, it has power to prescribe special conditions under which the ports of Alaska may be entered.

The reverse is equally true: If Congress have power to discriminate against Alaska by "regulations of commerce" it has power to close the ports of that territory entirely.

The question as to whether the equal right to trade

is an American right is, therefore, clearly presented.

The first occurrence of the words "privileges and immunity" in our constitutional history, is to be found in the fourth article of the old Confederation. It declares:

> "That the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states and the people of each state *shall have free ingress and egress to and from any other state* and shall enjoy therein all the privileges of *trade* and *commerce* subject to the same duties, imposts and restrictions as the inhabitants respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in Section 2 of the fourth Article in the following words:

> "The citizens of each state shall be entited to all the privileges and immunities of citizens of the several states."

Mr. Justice Miller in commenting upon these provisions in the Articles of Confederation and the Constitution asserts in the Slaughter House cases, 83 U. S., 36:

> "There can be but little question that the purpose of both these provisions is the same and that the privileges and immunities intended are the same in each. In the Articles of Confederation we have some of these specifically mentioned and enough, perhaps, to give some general idea of the class of civil rights meant by the phrase." (83 U. S., 75).

It will be observed, therefore, that this court has held that the rights of American citizenship includes equal rights and privileges of trade and commerce, equal right of ingress and egress to and from the several states.

In enumerating the rights of an American citizen as such, and as distinct from his rights as a citizen of a state, Mr. Justice Miller, quoting from Crandall vs. Nevada, 73 U. S. 745, says:

"He has the right of free access to its seaports through which all operations of foreign commerce are conducted." (83 U. S. 79).

And, continuing, this great Jurist adds,

"The right to use the navigable waters of the United States, however they may penetrate the territory of several states, and all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States and not citizenship of a state."

This is the right which was guaranteed to the people of Alaska by the treaty.

It is little comfort to the people of that territory to be accorded a right of trial by jury, or any other privilege accorded by the "bill of rights," if they are denied equal access to the markets of the other states or of the world for the products of their labor.

"So fundamental has this privilege of every citizen to be free from disparaging and unequal enactments, in the pursuit of the ordinary avocations of life, been regarded," says Mr. Justice Field in the Slaughter House cases, "that few instances have arisen where the principle has been so far violated as to call for the interposition of the courts." (83 U. S. 106).

And he continues:

"This equality of right with exemption from all *disparaging* and *partial* enactments in the lawful pursuits of life *throughout the whole country*, is the distinguishing privilege of citizens of the United States. To them everywhere, all pursuits, all professions, all avocations are open without other restric-

tions than such as are imposed *equally* upon all of the same age, sex and conditions." (Italics ours) (83 U. S. 109).

In the same case Mr. Justice Bradley says:

"If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States." (83 U. S. 113).

Discussing the same subject in the same case, Mr. Justice Swayne says:

"Life, liberty and property are forbidden to be taken 'without due processes of law' and 'equal protection of the law' is guaranteed to all. Life is the gift of God and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that limit lies the domain of usurpation and tyranny. property is everything which has an exchangeable value and *the right of property includes the power to dispose of it according to the will of the owner.* Labor is property and as such merits protection. The right to make it available is next in importance to the right of life and liberty. It lies to a large extent at the foundation of most other forms of property and of all solid individual and material prosperity * * * * * * * 'Equal protection of the laws' places all upon a footing of legal equality and gives the same protection to all for the preservation of life, liberty and property and the pursuit of happiness." (Italics ours) (83 U. S. 127).

The equal right to contract is a property right belonging to a citizen of the United States as such.

Lachner vs. U. S., 198 U. S. 52.

"Equal protection of the laws," says Mr. Justice Field in the Railroad Tax Cases, "not only implies the right of each to resort, on the same terms with others, to the courts of the Country for security of

his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burden or charges than such as are equally imposed upon all others under like circumstances. Unequal exactions in every form, or under any pretense, are absolutely forbidden."

The Railroad Tax Cases, 13 Fed. 722 (733).

Congress now says that the people of Alaska may not ship the products of their labor to the State of Illinois in the same manner or by the same means employed by the people of Oregon, or Washington or New York.

When the people of the Territory of Alaska were admitted to the rights, privileges and immunities of American citizens, and when it was guaranteed to them that they should be maintained and protected in the free enjoyment of their property, it comprehended, not only the equal right to life and liberty, but the equal right to trade and commerce, the equal right of ingress and egress to and from the several states,—these being indispensable property rights. Nothing less is meant by the right to "equal protection of the laws."

When the lower court insists that congress of the United States has a right to close the ports of Alaska or sell the Territory into foreign bondage, it is evident that the treaty with Russia, as well as the constitution, was overlooked.

In the name of the treaty and the constitution combined, the people of Alaska ask for equal rights with the people of the rest of the United States, to trade and commerce, and ask this as an indispensable ingredient of equal right to property and to the pursuit of happiness.

B.

INTERPRETATION OF CLAUSE 6 OF SECTION 9, ARTICLE I.

It is well settled by this court that the term "United States" as used in the Constitution applies to "The American Empire" and includes not only the various states but also the incorporated territories; hence, it is that the "uniformity clause" of Section 8, Article I., which provides that "All duties, imposts or excises shall be uniform throughout the United States," deprives Congress of power to discriminate for or against any incorporated territory.

Loughboraugh vs. Blake, 5 Wheat. 317.

In that case Chief Justice Marshall said:

> "The power, then, to lay and collect duties, imposts and excises may be exercised and must be exercised throughout the United States. Does this term designate the whole or any particular portion of the American Empire? Certainly this question can admit of but one answer. It is the name given to a great republic which is composed of states and territories. The District of Columbia, or the territories west of the Missouri, is not less within the United States than Maryland or Pennsylvania, and it is not less necessary on the principle of our Constitution that uniformity in the imposition of imposts, duties and excises should be observed in one than in the other."

This court has held in Rasmussen vs. United States, 197 U. S. 518, that Alaska has been incorporated into the United States and is an integral part thereof.

That case involved the question of whether or not the Constitution applied to Alaska.

Mr. Justice White, writing the opinion for the court, said:

> "It follows, then, from the text of the treaty by

which Alaska was acquired, from the action of Congress thereunder, and the reiterated decisions of this court, that the proposition that Alaska is not incorporated into and a part of the United States is devoid of merit, and therefore the doctrine settled as to unincorporated territory is inapposite and lends no support to the contention that Congress in legislating for Alaska had authority to violate the express command of the sixth amendment."

This court had previously in the case of Binns vs. United States, 194 U. S. 486, held that Congress might, in its capacity as a local territorial legislature acting for Alaska, levy a license tax for the sole benefit of the territory on business conducted within the territory. But also held that it could not do so in its capacity as a federal legislature.

In the Rasmussen case the court referred to its former decision in the Binns case in the folowing language:

"The court declared it to be settled that Alaska had been undoubtedly incorporated into the United States, and, hence, conceded that the license complained of was invalid if levied by Congress under the general grant in the Constitution of the power of taxation." (197 U. S. 524-5).

The question now before the court is whether clause 6 of Section 9, Article 1., is operative in Alaska. It reads as follows:

"No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another."

The first sentence prohibits preference by way of regulation (1) of commerce, or (2) of revenue. It is argued that this applies only to ports of the political units known as "states" and does not extend to the territories.

It must be admitted, however, that to construe this to mean that there may be discrimination by "regulation of *revenue*" between the ports of a state and those of a territory, will be in conflict with the uniformity clause of section 8 which deprives Congress of power to levy any "duty, impost or excise" other than "uniform throughout the United States."

And to hold that this sentence was intended to authorize Congress to discriminate against the citizens of the United States residing in a territory, and to do so by means of regulation of commerce, is to hold that this sentence is in conflict with the other provisions of the Constitution which insures to all citizens of the United States *equal* protection of the law.

If we admit that the prohibition against preference by "regulation of revenue" applies to a territory, but deny that the prohibition against preference by "regulation of commerce" applies also thereto, we split the sentence in the middle and divide that which was designedly united. We make ourselves guilty of even a worse offense than that; we give the word "state" when applied to one part of the sentence one meaning, and when applied to another part of the same sentence quite another meaning. This is not only grammatically obnoxious, but historically unjustified, for the Fathers were men who thought and wrote in straight lines.

Obviously, regulation of commerce and regulation of revenue were necessarily placed in the same category and on the same footing, because to grant equality in one without insuring equality in the other, would be useless.

Exactly the same situation arises in the second sentence of this clause. It is provided that, "nor shall any vessel bound to or from one state be obliged to enter, clear *or pay duties* in another."

It is conceded that the inhibition against requiring a vessel to "pay duties in another" applies to a territory,

but it is asserted that the inhibition against requiring it to "enter" or "clear" in another applies only to "states."

Either all or nothing of this provision must apply to territories. If it be construed to apply only to states, it is in conflict with the uniformity rule. To accept the other horn of the dilemma and apply one half of the sentence to a territory, and the other half to a state, should not be considered permissible unless the result is clearly in accord with the other clauses in the Constitution, as well as in accord with the spirit of the times in which the Constitution was written.

That the provisions of the sixth clause of section 9 was intended to apply to the entire Country, is demonstrated by the history of its origin and its adoption.

On the 28th day of August, 1787, the committee to whom these propositions were referred, reported as follows:

> "That there be inserted after the fourth clause of the seventh section, 'nor shall any regulation of commerce or revenue give preference to the ports of one state over those of another or oblige vessels bound to or from any state to enter, clear or pay duties in another and all tonnage, duties, imposts and excises laid by the legislature shall be uniform thruout the United States.' "

Reviewing the history of the last sentence of Clause 1 of Section 8 and Clause 6 of Section 9, Mr. Justice White, in Knowlton vs. Moore, 179 U. S. 107, after showing how these provisions originally appeared conjointly, relates:

> "On September 14, 1787, the words 'but all such duties, imposts and excises shall be uniform throughout the United States' which in their adoption had been associated with and formed but a part of the clause forbidding a preference in favor of the port of one state over the port of another state,— in other words, had been a part of another clause—were shif-

ted by unanimous vote from that paragraph and were annexed to the provision granting the power to tax.

"Thus it came to pass that although the provisions as to the preference between ports and that regarding uniformity of duties, imposts and excises, were one in purpose and one in their adoption, they became separated only in arranging the constitution for the purpose of style. The first now stands in the Constitution as a part of the sixth Clause of Section 9 of Article I. and the other as a part of the first Clause of Section 8 of Article I."

This common purpose of the two clauses of the Constitution referred to and emphasized by Mr. Justice White, is of importance in this discussion, for the reason that this court has already decided in the Binns case that Clause 1 of Section 8 applies to Alaska. It seems so clear that when these two provisions were incorporated into the Constitution the framers had a single mind to uniformity throughout the United States and equal treatment of all the citizens of the "American Empire."

The principles involved in this case were discussed at length, and, as we believe, settled, in Downs vs. Bidwell, 182 U. S. 244. That case involved the constitutional status of the people of Porto Rico under the treaty with Spain. The Foraker Act imposed a duty on merchandise imported into the United States from Porto Rico, and the question was whether or not the Constitution applied to that island.

The question before the court for decision was stated in the following language by Mr. Justice Brown:

"If Porto Rico be a part of the United States, the Foraker Act imposing duties upon its products is unconstitutional, not only by reason of violation of the uniformity clause, *but because by Section 9, vessels bound to or from one state cannot be obliged to en-*

ter, clear or pay duty in another." (182 U. S. 249).

No exception was taken to this statement of the case by any of the other justices. It was, in substance, repeated both by Mr. Justice White and by Mr. Chief Justice Fuller, and it was conceded by all that if the Constitution applied to Porto Rico, Clauce 6 of Section 9 was operative in that island the same as in a state.

Mr. Justice White stated, inter alia, the question before the court in the Downes case as follows:

> "It is contended that the duty collected was also repugnant to the export and preference clause of the Constitution. But as the case concerns no duty on goods going from the United States to Porto Rico, this proposition must depend also on the hypothesis that the provision of the Constitution referred to apply to Porto Rico because that island has been incorporated into the United States. It is hence manifest that the latter contention is involved in the previous one, and need not be separately considered."
>
> (182 U. S. 288).

Later on, in referring to this clause, he says:

> "But the power just referred to, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States. This results because the clause of the Constitution in question does not confer upon Congress power to impose such an impost duty on goods coming from one part of the United States to another part thereof."
>
> (182 U. S. 292).

In passing it will be observed that this eminent jurist has here construed the term "state" of the United States to mean "part" of the United States.

It will also be observed that no contention was made that Porto Rico was a state. The question was whether

or not, though only a territory, it was one of those territories to which the constitution applied. This court held that Porto Rico was not an incorporated territory and that the constitution had never been extended to the island either by the treaty or by any act of Congress. Throughout his opinion, Mr. Justice Brown at times reverted to and emphasized the word "state" as used in the claus in question, as if to indicate that it could not apply to territory. But he was the only one of the justices who seemed attracted to that view, and, moreover, the rest of his opinion indicates very clearly that he would have he that if by affirmative action by Congress the Constitution had been made applicable to Porto Rico, Clause 6 of Section 9 would have been operative to protect the island.

This feature he emphasized both in the Binns case and in the Rasmussen case. In the latter he says:

> "My position regarding the applicability of the Constitution to newly acquired territory, is contained in an opinion delivered by me in Downes vs. Bidwell. It is simply that the Constitution does not apply to territories acquired by treaty until Congress has so declared, and that in the meantime, under its power to regulate a territory, it may deal with them regardless of the Constitution.
>
> * * * * * *
>
> In the general act (R. S. paragraph 1891), Congress did declare that 'the Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within all organized territories and in every territory hereafter organized, as elsewhere within the United States.' If the Act of May 17, 1884, providing a civil government for Alaska be regarded as *organizing* a territory there, it would follow that such territory at once fell within R. S. section 1891, and the Constitu-

tion was extended to it without further action. The first article declares that Alaska 'shall constitute a civil and judicial district the government of which shall be organized and administered as hereinafter provided.' Had the opinion treated the territory as organized under this act, I should not have dissented from this view, since paragraph 1891 would have applied to it. (197 U. S. 532).

* * * * * *

The true answer to the question whether the Constitution applies to a territory, is to be found in the fact, whether Congress has extended the Constitution to it or not." (197 U. S. 534).

Mr. Chief Justice Fuller, in commenting upon the constitutionality of the Foraker Act in Downes vs. Bidwell, after quoting the sixth clause of Section 9, and referring to that clause, says:

"This Act on its face does not comply with the rule of uniformity, and that fact is admitted."

(182 U .S. 352).

This is simply another way of stating the problem before the court as it was stated by Mr. Justice Brown, and it confirms the assertion that the justices sitting in that case were unanimously of the opinion that this clause must be interpreted in the spirit of the uniformity rule in order to harmonize with the rest of the constitution, and that if the constitution had applied to Porto Rico, clause 6 of Secion 9 would also have applied.

Commenting further on the same subject, Mr. Chief Justice Fuller said:

"The power of Congress to act directly on the rights and interests of the people of the states can only exist by, and as granted by, the Constitution And by the Constitution Congress is vested with power 'to regulate commerce with foreign nations

and among the several states and with Indian tribes.' *The territories are, indeed, not mentioned by name, and yet commerce between the territories and foreign nations is covered by the clause, which would seem to have been intended to embrace the entire internal as well as foreign commerce of the Country.*"

(Italics ours) (182 U. S. 354-5).

It is of importance to observe that in this statement Mr. Chief Justice Fuller construes the word "state," as used in the Interstate Commerce clause of the Constitution, not to exclude the territories.

We quote the language of Chief Justice Taney in the Passenger Cases, 7 How. 492, as repeated by Mr. Chief Justice Fuller in Downes vs. Bidwell:

"Living as we do under a common government charged with the great concerns of the whole Union, every citizen of the United States from the most remote *states or territories* is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every state and territory of the Union. * * * * For all the great purposes of which the federal government was formed we are one people with one common country. We are all citizens of the United States; and, as members of the same community, *must have the right to pass and repass thru every part of it without interruption*, as free as in our states." (Italics ours) (182 U. S. 360).

In Dred Scot vs. Sandford, 19 How. 393, the court was unanimous in holding that the power to legislate respecting a territory was limited by the restrictions of the Constitution.

In the case of United States vs. Morris, Fed. Cas. No. 15,815, Mr. Justice Curtis observed:

"Nothing can be clearer than the intention to have the Constitution, laws and treaties of the United

States in equal force throughout every part of the territory of the United States alike in all places at all times."

In Murphy vs. Ramsey, 114 U. S. 15, Mr. Justice Mathews said:

"Personal and civil rights of the inhabitants of the territories are secured to them as to other citizens by the principle of constitutional liberty which restrain all the agencies of government, state and national. The political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States." (114 U. S. 44).

In the Downes case the Attorney General took the position, just as in the case at bar, that Congress had unrestrained power over commerce between the territories and the states, but this court refused to accept that view, as is clearly pointed out by the Chief Justice who says, referring to the Foraker Act:

"If this can be done, it is because the power of Congress over commerce between the states and any of the territories is not restricted by the Constitution. This was the position taken by the Attorney General with a candor and ability that did him great credit.

"But that position is rejected, and the contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period."

(182 U. S. 372).

In Dooley vs. U. S., 183 U. S. 151, the same doctrines are repeated by the Chief Justice and never controverted by any of the justices. After quoting clauses 5 and 6 of Section 9, the Chief Justice says:

"These provisions were intended to prevent the application of the power to lay taxes or duties, or the

power to regulate commerce so as to discriminate between one *part* of the country over *another*. The regulation of commerce by majority vote, and the exemption of exports from duties or taxes, were parts of one of the great compromises of the Constitution." (Italics ours) (183 U. S. 168).

And again,

"But if that power of regulation is absolutely unrestricted as respects interstate commerce, then the very unity the Constitution was framed to secure, can be set at naught by a legislative body created by that instrument.

"Such a conclusion is wholly inadmissible. The power to regulate interstate commerce was granted in order that trade between the states might be left free from discriminate legislation, and not to impart the power to create antagonistic commercial relations between them

"*The prohibition of preference of ports was coupled with the prohibition of taxation on articles exported. The citizens of each state were regarded entitled to all privileges and immunities by citizens in the several states, and that included the right of ingress and egress, and the enjoyment of the privileges of trade and commerce.*" (Italics ours) (183 U. S. 171-2).

Referring in the same opinion to the Interstate Commerce clause of the Constitution, the Chief Justice said:

" . . . And this is equally true in respect to commerce with the territories, for the power to regulate commerce includes the power to regulate it, not only as between foreign countries and the territories, but also by necessary implication as between the states and territories.

"Nothing is better settled than that the states cannot interfere with interstate commerce, and it is easy to see that if the exclusive delegation to Congress of

the power to regulate commerce did not embrace *commerce between the states and territories, that interference by the states with such commerce might be justified.*" (Italics ours) (183 U. S. 172-3).

It is difficult to see how this court can hold that the constitution of the United States guarantees to the people of Alaska equality before the law,—equal right to protection of life, liberty and property, and yet be denied equal opportunity to engage in trade and commerce. If Congress has a right to prohibit the people of Alaska from shipping in foreign vessels and yet grant that privilege to people of other parts of the Country, it has the right to deny to the people of Alaska equality before the law. If Congress has the authority to deny the people of Alaska the right to ship in foreign vessels, though such privilege be extended to people in other parts of the Country, Congress would, unquestionably, have the right to deny to the people of Alaska the right to ship in any vessel whatever though such privilege be extended to the people in other parts of the Union. In other words, Congress would have the right to close the ports of Alaska when the ports of the rest of the Country are kept open,—just as asserted by the trial court in this case. If that be conceded the vaunted equality disappears and the treaty is violated.

No such right has ever been claimed or exercised or attempted to be exercised by Congress of the United States over any incorporated territory during the one hundred and thirty two years of its existence under the Constitution, until the sixty-fifth Congress undertook to make the great Territory of Alaska pay tribute to the ports of Puget Sound. And that historical interpretation of the Constitution by Congress itself should have some weight in interpreting the language employed in that document.

The first invasion of the equal right of the territory to trade and commerce occurred when the Act of October 6th, 1917, giving the United States Shipping Board au-

thority to permit foreign vessels to carry freight between American ports during the war, was passed.

That Act (Sec. 7709aa, Compiled Statutes) provides:

> "During the present war with Germany and for a period of one hundred and twenty days thereafter the United States Shipping Board may, if in its judgment the interests of the United States require, suspend the present provisions of law and permit vessels of foreign registry, and foreign-built vessels admitted to American registry under the Act of August eighteenth, nineteen hundred and fourteen, to engage in the coastwise trade of the United States: Provided, That no such vessel shall engage in the coastwise trade except upon a permit issued by the United States Shipping Board, which permit shall limit or define the scope of the trade and the time of such employment: Provided further, That in issuing permits the board shall give preference to vessels of foreign registry owned, leased, or chartered by citizens of the United States or corporations thereof: *And provided further, That the provisions of this Act shall not apply to the coastwise trade with Alaska or between Alaskan ports.*"

At that time, when there was throughout the world a dearth of transportation facilities, when humanity was clamoring for food, fish was rotting on the wharfs of Alaska for lack of ships to carry it to the states. Yet, British vessels, ready and willing to carry our cargoes of food, passed our ports weekly, but were denied the right to assist in relieving the distress, because it might interfere with the only two American steamship lines operating in Alaska,—"two lines with but a single thought, two hearts that beat as one."

That same pirate spirit which during the war expressed itself in the Alaska clause of the foregoing law,

has still sufficient influence at the Capitol to put Section 27 of the Jones Law upon the statutes of the Country.

C.

MEANING OF THE TERRITORIAL CLAUSE IN THE CONSTITUTION

The position of the Government is expressed by the learned Trial Court in the following language:

> "The very constitution which is invoked provides that Congress has power 'to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States.' (Constitution, Article 4, Section 3, Clause 2). Can it be doubted that under the power thus conferred, Congress has the power, if it chooses to exercise it, to absolutely close, not only the Port of Juneau, but all the ports of Alaska? Could it not, if it so chose, prohibit all commercial intercourse with Alaska, having been given the power 'to dispose of' the Territory? Could it not dispose of any part, or the whole, thereof? He who denies the existence of this power, would have a hard time explaining what is meant by the words, 'shall have power to dispose of.' If Congress has the power to dispose of Alaska or the power to prohibit commercial intercourse with Alaska, can it be argued that it has not the power to prescribe that such commercial intercourse as is to be had with Alaska, shall be had by means of vessels of American ownership and register?"
>
> (Pg. 11).

It may with equal logic be added that if the Congress has power to discriminate against the ports of the Territory, it has power to close its ports, and if it has power to close the ports of the Territory it has power to other-

wise dispose of the Territory, for the right to discriminate involves the right to destroy.

If we admit the Court's premises, the conclusion is irresistible. If Congress has "power to dispose of" Alaska, Congress may do as it sees fit with this Territory and its people. It may close every port of the Territory; it may sell the Territory into foreign bondage and permit its people to be ruled by foreign potentates.

The lower court is either all right or it is all wrong. There is no middle ground.

But what did the framers of the Constitution mean by the term, "power to dispose of and make all needful rules and regulations respecting The Territory?"

At the time the Constitution was framed, there was only one territory, and that was the "district" Northwest of the Ohio River. This was the territory referred to.

After the Constitutional Convention had convened on the 25th day of May and while it was deliberating, the Congress, sitting under the provision of the Article of Confederation of 1777, adopted, on July 13, 1787, the ordinance of that date which bound the states and *their people* with the territory and *its people* in a solemn contract, inter alia, as follows:

> "Section 14: It is hereby ordained and declared by the authority aforesaid, that the following articles shall be considered as Articles of Compact between the original states and *the people* and states *in the said territory*, and *forever remain unalterable unless by common consent*, to-wit:"

Then follows six articles forming fundamental rights of the states and their people as well as of the people of the territory.

Article 4 provides, inter alia:

> "The said territory and the states which may be formed therein, *shall forever remain a part of this Confederation of the United States of America*, sub-

ject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made and to all the acts and ordinances of the United States in Congress assembled conformable thereto . . . . . ."

These brief quotations are sufficient to show that at the time the Constitution took its form, there was a settled purpose in the minds of the people of the United States to *not* "dispose of" or abandon the territory. The rest of the ordinance discloses an equally settled determination to protect the territory and its people in the enjoyment of the very same rights which the people of the states claimed for themselves.

This compact was signed, as already remarked, at the time the Constitutional Convention was in session. What excuse is there for the assertion that it was the intention of the Convention to bestow upon Congress the right to violate the ordinance of July 13th?

When in 1787 while the Constitutioin was in making, the various states placed their possessions northwest of the Ohio River under the management of Congress, it was done with the specific reservations and covenants set out in the ordinance of that year, and it was done principally for two purposes; viz: to eliminate dispute over boundaries, and to raise by sale of lands, revenue with which to liquidate the national debt.

That each state exercised extreme caution that the united territory and its people should be forever protected in the equal enjoyment of all the rights enjoyed by its parent states and their people, is amply testified to by the ordinance. Each state in that compact bound itself with every other state, as well as with the people of the Northwest Territory, to protect the latter in the equal enjoyment of all those rights, privileges and immunities which each state claimed for itself, to establish and maintain a government in the territory based upon the American principles and to create out of the territory sovereign states as soon

as the population increased sufficiently to be able to support such government.

Not even the commercial equality of the people of the territory was overlooked.

In Article IV. of the Ordinance of 1787, it is provided,

> "The navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same, shall be common high-ways and forever free, as well to the inhabitants of said territory as to the citizens of the United States and those of any other state that may be admitted to the Confederaion, without any tax, impost or duty therefor."

This clearly expresses a determination to treat the commerce and the ports of the territory exactly in the manner it has been determined to treat the commerce and the ports of the rest of the United States.

These were the covenants and these were the plans, purposes and ambitions out of which the Constitution of the United States grew, and to vindicate and execute which it was formed.

In the light of that mental condition of the Fathers, the language employed by them must be interpreted for, "The intent of the law-makers is the law." It must be obvious that, as a matter of fact, the Constitutional Convention had no intention of giving to Congress power to do as it pleased with "The Territory" and its people.

Is the lauguage employed by them such as to impel this Court to impute a meaning which extrinsic facts prove to be not intended?

All the proceedings and debates of the Constitutional Convention and all the steps leading up to the final adoption of the Constitution, are so permeated with the idea of uniformity of all regulations and equality of all sections of the Country, that we look in vain for the least expression of any idea that the territory, or any part of

it, might be treated differently, commercially or otherwise, from any other section.

Indeed, it may be said that the Constitutional Convention met for the purpose of devising a system by which every section of the Country might be insured against discrimination of any kind. How to insure that uniformity and equality, and protection against discrimination, was the one subject under discussion. So paramount was this idea of uniformity, that if there had been in mind any intent to discriminate against the territory, some expression of such intent would have occurred plainly somewhere in the records of the proceedings.

The idea of uniformity of taxation and uniformity in commercial rights, were always coupled together in the minds of the members of the convention. One was considered barren without the other, and justly so.

The question now arises as to what these men had in mind when they wrote into the Constitution the second clause of Section 3 of Article IV. upon which the lower court placed so much stress.

The records show that this clause was, as it were, an afterthought.

The temporary government of the territory had been provided for by the ordinance. The future disposition of the territory had been definitely arranged for by the same document. Its status and the status of its people had also been recognized by the part of the Constitution which had been tentatively agreed upon, when on the 18th day of August the subject of the "back lands" was introduced.

The history of this clause is given in the following langauge by William M. Meigs in "The Growth of the Constitution in the Federal Convention of 1787."

> "On August 18 Madison introduced and had referred to the Committee of Detail a series of powers which he proposed to confer on Congress; among them was one 'to dispose of the unappropriated lands

of the United States,' and another 'to institute temporary governments for new states arising therein.' The Committee of Detail reported on these subjects on August 22 through Rutledge, and recommended to insert the following words at the end of the sixteenth clause of the first section of the seventh article, among the powers of Congress:—

> " 'And to provide, as may become necessary from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the government of individual states, in matters which respect only their internal policy, or for which their individual authority may be competent.'

"This proposal does not seem to have been taken up at any time by the Convention, but some of it found its way into the Constitution in the following manner, while it was also enlarged to cover other points. On August 30, during the discussion of the provision for the admission of new states (Article IV., Section 3, Clause 1), Carroll moved a proviso thereto to declare that nothing in the Constitution should affect the right of the United States to the back lands. He explained that the popular sentiment in Maryland was very strong on this subject, and intimated that the Constitution would hardly be agreed to in that State otherwise. His motion to refer this proposal to a committee was defeated, but he later moved a proviso as follows:—

> " 'Provided, nevertheless, that nothing in this Constitution shall be construed to affect the claim of the United States to vacant lands ceded to them by the treaty of peace.'

"He explained that, though this might be understood as relating to lands not claimed by any parti-

cular states, he had some such in view. Wilson was against it as unnecessary. Madison thought the claims of the United States might in fact be favored by their courts having jurisdiction, but was inclined to think it best to say nothing upon the subject; in any event, it ought to go further and declare that the claims of particular states also should not be affected. Carroll then withdrew his motion, and offered the following instead:—

> " 'Nothing in this Constitution shall be construed to alter the claims of the United States or of the individual states, to the western territory; but all such claims shall be examined into, and decided upon, by the Supreme Court of the United States.'

"But the following substitute was offered by Governeur Morris and was adopted by the Convention.—

> " 'The legislature shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution contained shall be so construed as to prejudice any claims, either of the United States or of any particular state.'

"Luther Martin moved an amendment, 'but all such claims may be examined into, and decided upon, by the Supreme Court of the United States,' but it was lost.

"The first portion of the motion of Governeur Morris was evidently adapted from the proposals which Madison made on August 18. The matter was later referred to the Committee on Style, and they reported it back in the following form:—

> " 'The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belong-

ing to the United States; and nothing in this Constitution shall be so construed as to prejudice any claim of the United States, or of any particular state.' "

This shows that it was the disposal of the soil that was in the mind of the convention and little if anything more. This was sufficient, for the rest of it had been settled by the covenants in the ordinance.

The members of the fiirst Congress considered themselves bound by the limitations of the Constitution when dealing with the Northwest Territory.

I Stat. at L. 50 ch. 8.

The courts throughout the Country had uniformly held that the Constitution of the United States did not supersede or in any manner abrogate the ordinance of 1787, but supplemented it, and that the ordinance remained in full force until superseded by state constitutions.

In Spooner vs. McConnell, Fed. Case. No. 13,245, Circuit Justice McLean said:

"It is a well established principle that no political change in a government annuls a compact made with another sovereign power or with individuals. The compact is protected by that sacred regard for plighted faith, which should be cherished alike by individuals and organized communities. A disregard of this great principle would reject all the lights and advantages of civilization, and throw us back on barbarism. This compact was formed between communities and the future inhabitants of a rising territory, and the states which should be formed within it. And all who became inhabitants of the territory made themselves parties to the compact, and the compact so formed could only be rescinded by the common consent of those who were parties to it."

See also,

Cincinnati vs. Louisville & Nashville Ry Co., 223 U. S. 390;

Choisser vs. Hargraves, 2 Ill. (1 Scam.) 317.

It has also been held that the covenants of this ordinance became binding upon new territory acquired by and incorporated into the United States subsequent to the adoption of the Constitution.

In Palmer vs. Cuyahoga County, Fed. Cas. No. 10,688, the court said:

> "In the argument the defendant's counsel insist that the Cuyahoga River being within 'that territory called Western Reserve of Connecticut, and which was excepted by the state of Connecticut, out of the cession made by it to the United States in 1786, is not subject to the ordinance. That neither the right of soil or jurisdiction in the reserve was ever vested in the United States until the deed of cession by Connecticut to the United States which was long after the date of the ordinance.' That this reserve was, to some extent, subject to the legislation of Connecticut for several years after the date of the ordinance, is admitted. But when this territory and the jurisdiction over it were ceded to the United States, it became subject to the ordinance, the same as every other part of the Northwest Territory. Rights acquired under the former laws are governed by those laws. But on its cession to the Union, all the laws of the territory, and especially fundamental laws, became the law of the reserve. By consenting to come under the federal government, they became parties to the articles of compact contained in the ordinance."

It is a matter of history that the covenants of the ordinance of 1787 became so much a part of the American conscience that they were treated as applicable to Ore-

gon and Louisiana as well as to the territory acquired from Mexico.

There were provisions in the ordinance which were regarded merely as temporary. But these do not relate to rights of citizens of the United States. They relate only to political rights, which belong only to citizens of a state, as distinguished from those which belong to a person as a citizen of the United States.

The learned court below argued that "The Constitution was adopted as a compact between independent states, thirteen of them originally." (Pg. 9).

This being apparently an extract from one of Mr. Hayne's speeches, it may be appropriate to answer by quoting the following from the reply by Mr. Webster:

> "The Constitution itself in its very front refutes that. It declares it is ordained and established by the people of the United States. So far from saying that it is established by the government of the several states, it does not even say it is established by the people of the several states. But it pronounces that it was established by the people of the United States in the aggregate."

This court ,through Mr. Justice Story in Martin vs. Hunter, 1 Wheaton 304-331 said:

> "The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by 'the people of the United States.'" (1. Wheat. 323).

Again, in McCulloch vs. Maryland, 4 Wheat. 316, Mr. Chief Justice Marshall said:

> "The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained 'in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of li-

berty to themselves and their posterity.' "
(4 Wheat. 402).

The members of Congress as well as the deputies to the Continental Convention represented the Western regions, formerly parts of their respective states, as much as they represented any other part of their state. These men were dealing with "states," but with states which in their minds, in the aggregate, comprised the American Empire which they designated the United States.

In their love of good style the proper committees, in drafting the various clauses, sought to avoid tautology by using the "United States" and "states of the Union" interchangeably.

Character of the Authority of Congress Over Incorporated Territories.

Congress, in dealing with an incorporated territory, has two separate functions: One as a federal legislature and the other as a local legislature for the internal affairs of the territory.

As a federal legislature Congress has only such powers as are placed in its hands by the Constitution, subject to such limitations as the Constitution prescribes.

As a local territorial legislature it has all such powers as are reserved to the states—but no more.

Acting as a federal legislature Congress is bound to protect the rights of an American citizen as a citizen of the United States.

Acting as a territorial legislature, in providing for the local government of the territory, Congress cannot violate the rights which the inhabitants of the territory are guaranteed as American citizens, any more than can a state do so.

The political rights—the right to vote and be voted for—are not rights pertaining to citizenship of the Unit-

ed States. Such rights pertain only to citizenship of a state, and by Congress may be prescribed for a territory.

Pope vs. Williams, 193 U. S. 632;

United States vs. Anthony, 24 Fed. Cas. 14,459;

Stone vs. Smith, 159 Mass. 414.

When the fourteenth amendment provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," it is not intended that Congress may do so. Congress was already charged with protecting those rights. This amendment was adopted for the purpose of making it clear that the federal government had power to reach into the states to prevent others from violating those rights which were guaranteed by the Constitution.

In the Binns case this court held that when acting as a federal legislature the Congress was limited by the uniformity clause even in its dealings with a territory. In the Rasmussen case this court held that in acting as a local territorial legislature Congress was bound to respect the guarantees of the sixth amendment.

But are the rights to equality in taxation, and the rights to trial by jury, any more sacred than the other rights secured by the Constitution to a citizen of the United States? The rights to equal protection of all laws is as sacred. The equal right to ingress and egress to and from other states is a sacred.

But even should it be conceded, for the sake of the argument, that Congress in its capacity as a local legislature is unrestrained by constitutional limitations, it cannot be controverted that Congress enacted the shipping law pursuant to its power under the Interstate commerce clause of the Constitution. The law complained of is strictly a federal law enacted by Congress in its federal capacity. Acting in that capacity, Congress could act only as authorized by the Constitution. Its primary duty is to make the laws equal and impartial.

Could Congress by virtue of the powers conferred by the Interstate Commerce clause enact a law that is partial and discriminates between the states or between the citizens of a state?

If not, why not?

Because such legislation is in violation of the constitutional provision which vouchsafes to all "equal protection of the laws," equal "rights, privileges and immunities."

But these are the very rights which have been bestowed upon people of Alaska both by the treaty and by the Constitution. It is, therefore, exactly as wrong for Congress to discriminate against a territory and its people as it is to discriminate against a state and its people. The same constitutional guarantees against discrimination, protect both the territory and the state.

There is another objection to asserting that Congress may, in its capacity of a territorial legislature, enact discriminatory commerce regulations, and this objection is stated clearly by the Chief Justice in the Downes case as follows:

> "It is evident that Congress cannot regulate commerce between the territory and the states and other territories in the exercise of the bare power to govern the particular territory, and as this Act was framed to operate, and does operate on the people of the states, the power to so legislate is apparently rested on the assumption that the right to regulate commerce between the states and territories comes within the commerce clause by necessary implication."
>
> (182 U. S. 354-5).

In the case of Stoutenburgh vs. Hennick, 129 U. S. 141, the Chief Justice said:

> "In the matter of interstate commerce the United States are but one country and are and must be subject to one system of regulation and not to a multi-

tude of systems."

In the Downes case, Mr. Justice White said:

"As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority, necessarily limit its powers on this subject."

In the same case and touching the same point, Mr. Chief Justice Fuller quoted the language of Mr. Chief Justice Taney in the Passenger Cases (7 How. 283, 492), and which language is so pertinent here, has already been quoted on page 27 of this brief.

D.

WHERE THE TERM "STATE" INCLUDES "TERRITORY"

The third clause of Section 8 (the Interstate Commerce clause) reads:

(Congress shall have power) "to regulate commerce with foreign nations and among the several states and with Indian tribes."

This power is exclusive. Nothing is here said about the territory. But does it exclude the "states" from regulating commerce between a state and the territories? Does it vest Congress with power to regulate commerce between the territories and the states? If it does, why does it? For the obvious reason that at the time the Constitution was drafted and adopted, the public mind was so permeated with the idea that the territory was on an equal footing with the states, so far as treatment of commerce was concerned, that no other relationship except that of equality was thought of, and for the further reason that any other view would not give the people of the territories the equal protection of the laws guaranteed by other parts of the Constitution.

Louis Simpson, 15 Fed. Cas. No. 8533;
Handley vs. Kansas City So. Ry., 187 U. S. 617;
Beitzell vs. District of Columbia, 21 App. D. C. 49.

In the second Dooley case the Chief Justice said:

"Nothing is better settled than that the states cannot interfere with interstate commerce, and it is easy to see that if the exclusive delegation to Congress of the power to regulate commerce did not embrace commerce between the states and territories, that interference by the states with such commerce might be justified."

The fifth clause of Section 9, Article 1. provides,

"No tax or duty shall be laid on articles exported from any state."

Will it be contended that this means that Congress may lay taxes on articles exported from a territory which has been incorporated into the Union? Such interpretation will certainly violate the guarantees of the Ordinance of 1787, and the uniformity clause of the Constitution, as well as the provisions guaranteeing to all equal protection of the laws. In order to harmonize with the rest of the Constitution, this clause must be interpreted to read:

"No tax or duty shall be laid on articles exported from any *part* of the United States."

The first clause of Section 10 provides:

"No state shall enter into any treaty, alliance, or confederation," etc.

But may a territory do so? May Congress acting as a territorial legislature, do so. Could the Northwest Territory, under the provision of the Ordinance of 1787, do so? Obviously not.

The second clause of Section 10 provides:

"No state shall, without the consent of Congress, lay any imposts or duties on imports or exports," etc.

Is not a territorial legislature, as well as Congress

when acting as a territorial legislature, bound by this clause?

The first clause of Section 2 of Article 4 provides:

> "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

Were not the citizens of "The Territory" always entitled to the same rights? If they were, by virtue of what provision of the Constitution were they if not by the foregoing?

The fourteenth amendment provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," etc.

But can a territory, or can Congress acting as a territorial legislature, do so? If not, why not?

These are a few illustrations which demonstrate that in the interpretation and application of the Constitution, "The letter killeth but the spirit maketh whole."

E.

ALLEGATION OF ESTABLISHMENT OF THROUGH ROUTE BY INTERSTATE COMMERCE COMMISSION NOT NECESSARY.

The learned court below held that the complaint was defective for failure to aver that a through route over Canadian lines and via British vessels had been established between Alaska and the states.

But Section 27, so far from requiring or even permitting the establishment of such routes, expressly prohibits shipments to Alaska via foreign vessels. It does require the establishment of such through routes when the shipment is made between two points in the continental

United State south of Canada. No authority is given, either to the courts or to any of the departments, to extend that rule or requirement to any other territory.

If the law had provided that when merchandise is shipped from Chicago to Seattle via Canada a red tag must be tied on the packages, would it have been necessary to allege that the red tag was attached to the shipment here in question?

To allege that a through route had been established between Michigan and Alaska via British vessels would be to allege something which the statute in question neither requires nor permits.

The ruling of the lower court is evidently based upon the theory that while the section in question is void because discriminatory in its application, it can be rendered valid by giving it a nondiscriminatory enforcement. Obviously, if a statute is void because it covers only a part of the subject it cannot be rehabilitated by the Executive Department by extending it over the entire subject.

There is no lawful warrant for reading into a statute something which has been expressly excluded.

The law is unconstitutional because it is too narrow. It cannot be rendered constitutional by applying it to subjects or territories it was not designated by the legislature to cover.

In some instances, where the statute is unconstitutional because it is too broad, the obnoxious excess may be lopped off or disregarded.

> "The general rule is that if a proviso operates to limit the scope of the act in such manner that by striking out the proviso the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent."
> 6 R. C. L. 129;

Chicago, M. & St. P. R. Co., vs. Wesley, 178 Fed. 619;
State vs. Cudahy Packing Co., 33 Mont. 179;
State vs. Mitchell, 97 Me. 66;
State vs. Chicago etc. R. Co., 195 Mo. 228;
Kellyville Coal Co. vs. Harrier, 207 Ill. 624;
State vs. Pitts, 160 Ala. 133;
Edmonds vs. Herbrandson, 2 N. D. 270.

The statute here in question is either void in whole or valid in whole. If it be void in whole there is no authority for confiscating the shipment in question. For it is alleged that they are made in every way in conformity with the requirements of the laws of the Country and the rules of the Treasury Department, except the provisions of Section 27.

It must not be overlooked that this section, reduced to direct language, simply says that the people of Alaska are prohibited, under any and all conditions, from employing foreign ships on the trans-Canadian routes although the people of the states are permitted to do so.

Respectfully submitted,

JOHN RUSTGARD,
Attorney General of Alaska,
Attorney for Appellants.

APPENDIX A.

Chapter 25 *of Laws of Alaska for* 1921.

AN ACT

To provide for the institution and maintenance by the Territory, or in its name, of various proceedings before courts of Justice and other tribunals and officers, to protect the rights or promote the interests of the people of the Territory, and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Whenever the constitutionality or validity of any statute is seriously in doubt, and the enforcement of such statute affects the Territory or a considerable portion of its people or important industries therein, suits or actions may by the Attorney General be instituted in the name of the Territory in any court to determine the constitutionality or validity of such law. And such proceeding may be had for that purpose either by means of suits to restrain, or by means of action to compel, the enforcement of such law, or by any other appropriate proceeding that will bring the question at issue fairly before the court. Or, the Attorney General may for such purpose institute or defend actions or suits for private individuals or corporations, and at the expense of the Territory, whenever the importance of the questions involved to the inhabitants of the Territory shall warrant it; but no such proceeding shall be instituted or maintained in the name of the Territory or at its expense except with the approval of the Governor, Secretary and Treasurer or any two of them in the manner hereinafter provided.

Section 2. It shall also be the duty of the Attorney General to protect the interests of the Territory and its

people before the United States Shipping Board, the Interstate Commerce Commission, or any other Bureau, board, committee, commission or officer of the United States, or of any of the States of the Union, in any action, suit, proceeding or hearing in which the Territory is a necessary or a proper party, or in which the Territory or its people, or a considerable portion thereof, are interested, or its industries are materially affected; and it shall be his duty to institute on behalf of the Territory and in its name any appropriate proceeding before such board, commission, committee, officials or other tribunals to protect the right and promote the interests of the Territory and its people, subject, however, to the provisions of the succeeding sections in this act.

Section 3. That the Governor of the Territory is hereby constituted the Agent of the Territory of Alaska, upon whom service of summons or other process or notice of hearing shall be made in any action, suit, or proceeding which may be instituted or pending in any of the Courts of the United States, or before the United States Shipping Board, the Interstate Commerce Commission or any other Bureau, Board, Committee, Commission or officer of the United States or of any of the States of the Union and in which the Territory is a necessary or proper party or in which the Territory or the people or a considerable part thereof are interested.

Section 4. That when served with summons, process or notice of any hearing or action, suit or proceeding of any nature instituted or pending before the tribunals or officers aforesaid, in which the Territory may be a proper or necessary party, or in which the interests of the Territory or its people may be involved or affected adversely or otherwise, or if it shall come to his attention that the interests of the Territory or its people or a considerable portion thereof are or may be liable to be affected in any suit, action, hearing or proceeding pending before

any of the said tribunals or officers, it shall be the duty of the Governor of the Territory to immediately call into consultation the Secretary, Treasurer and Attorney General of the Territory to determine whether any action should be taken in behalf of the Territory therein, and if it be determined by a majority of them that the interests of the Territory or a considerable portion of its people are liable to be adversely affected or that they may be promoted or protected by an appearance in or at such action, hearing or proceeding, the Governor shall so instruct the Attorney General in writing and direct him to appear and represent the Territory therein.

Section 5. On receiving such instruction from the Governor to so appear in such action, hearing or proceeding, the Attorney General shall, and he is hereby authorized and directed to appear on behalf of the Territory or its people, and use all proper means to protect the interests so entrusted to him as therein directed. And the said Attorney General shall be authorized to employ additional counsel to attend and represent the Territory in said proceeding, but only after receiving the authority to do so from the Governor, Secretary and Treasurer, or any two of them, made after a finding by them that the expense of such additional counsel will be less than expenses likely to be incurred by personal attendance of the Attorney General or where additional counsel because of the importance of the matter involved would in their judgment be for the best interests of the Territory.

Section 6. When in the opinion of the Governor, the Secretary and Treasurer of the Territory, or any two of them it shall be for the best interests of the people of the Territory, or the Territory itself to commence any action, hearing or other proceeding before any Court, tribunal or Board or Commission, or officer mentioned in Sections 1 and 2 of this Act, they shall so direct the Attor-

ney General, under the hand of the Governor, and the Attorney General shall proceed as directed therein, if in his opinion the action or proceeding can be prosecuted with success. If his opinion is adverse to such action he shall set forth the reasons for such opinion and embody same and the correspondence in regard thereto in his biennial report to the Legislature.

Section 7. The Attorney General is authorized and empowered in any hearing or proceeding, in which he has appeared or is about to appear before any Board, Court, Commission, Committee, or officer of the United States involving, or which may involve, traffic and commerce or rates of transportation or carriage between points within the Territory to or from points without the Territory; or between places within the Territory, to demand from any person, firm or corporation, engaged in the transportation business in whole or in part between such points or places, any information which may be pertinent at such hearing or proceeding or which may be necessary to prepare for the defense of the interests of the people of the Territory thereat and may require by notice in writing that such person, firm or corporation, furnish or produce, within a reasonable time, for his inspection, any books or other records, in the possession of such person, firm or corporation, showing the amount of freight and passenger traffic to and from or within Alaska; the rates respectively charged therefor on each class of freight or passenger; the carriage expense; and other expense in aggregate and detail including overhead charges; the bonded and other indebtedness and interest charges; the gross capital invested and how invested; amount charged off for depreciation; the gross and net income and any other data either in detail or the aggregate necessary or pertinent in such hearing or proceeding and in the event such person, firm or corporation neglect, or fail, or refuse to furnish, produce or deliver such data or informa-

tion to or its books or records for inspection by the Attorney General upon his demand in writing, within a reasonable time, specifically detailing the information required, and reason and necessity therefor, for use in such hearing or proceeding the said Attorney General may present to the judge of the District Court of Alaska, his petition in the name of the Territory for the production or furnishing of such data or information or production of books and records for inspection. Such petition shall set forth therein the nature of the hearing or proceeding for which the information is required, the necessity or materiality thereof and such other facts as may be pertinent to place before the Judge the importance of obtaining the same, and thereupon if the court shall be satisfied that the petition is made in good faith to obtain information necessary or important to the Territory or its people at the hearing or proceeding designated and that the same can or ought to be supplied to the Territory, he shall issue an order directing such person, firm or corporation to appear before the Court on a day and hour certain to show cause why an order should not issue directing the furnishing of such data or the producing of such records or books or part thereof as the court shall deem proper. Said order shall be served on such person, firm or corporation in the same manner as other process of the court. At the time set therein, or such other time as the court may in its discretion set, the court shall hear and determine the issues formed by the petition and any answer thereto which may be filed, and shall determine whether the information or data mentioned in the petition is necessary or important in whole or in part to the Territory in the hearing in which it is proposed to be used; whether the same can be obtained and whether such person, firm or corporation should produce the same or any part thereof for the purpose designated and if it be found by the Court that such information or data is important for prepara-

tion for trial to the petitioner, or is necessary or important at such hearing and that the same should be produced or furnished the Attorney General for preparation for or for use, or production at such hearing, he shall enter an order accordingly specifying therein the time within which the same shall be furnished or produced for inspection and whether in whole or in part and what part. If such person, firm or corporation so ordered shall fail, neglect or refuse to produce for inspection or furnish the information to the Atorney General in the manner and within the time limited in such order, the said person, firm, or corporation shall be deemed guilty of contempt and shall be fined in any sum not exceeding five thousand dollars, which fine shall be covered into the general fund of the Territorial treasury.

Section 8. That the necessary expenses of the Attorney General in making investigation for and in appearing in such hearing or proceedings shall be provided for out of the emergency appropriation in such amount or amounts, as from time to time may be necessary, the same to be allowed and audited by the Governor, Secretary and Treasurer or any two of them, who, before allowance, shall certify to the necessity for such expenditure and the reasonableness of the amounts so allowed.

Section 9. An emergency is hereby declared to exist, and this Act shall take effect from and after its passage and approval.

Approved May 3, 1921.

APPENDIX B.

SENATE CONCURRENT RESOLUTION NO. 5.

BE IT RESOLVED by the Senate, the House of Representatives concurring, that

WHEREAS, the provision of Section 27 of the General Shipping Bill of June 5, 1920, excluding Alaska from the enjoyment of the benefits of through routing over Canadian lines, the same as is bestowed upon every other part of American territory, is a vicious discrimination against and a great injustice and injury to our people; and

WHEREAS, we believe that said discrimination is in violation of Section 9, Article 1, of the Constitution of the United States, which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another;"

NOW, THEREFORE, the Attorney-General is hereby instructed to take all proper measures to test and determine the validity of the law in question, to the end that the discrimination against Alaska by the enforcement of the aforementioned provision may be discontinued.

Passed by the Senate, March 29, 1921.

Passed by the House, April 8, 1921.